

Exhibit No. 2Date 2-4-15**Montana Senate Committee on State Administration on SB 195****Testimony**

by Mark San Souci

4 February 2015

Honorable Chair Brown and committee members, thank you for the opportunity to provide information and ask for your support for **Senate Bill 195**.

My name is Mark San Souci, a retired Air Force Officer and presently the Department of Defense (DoD) Regional State Liaison for the Northwestern, working for the Deputy Assistant Secretary of Defense for Military Community and Family Policy. Thank you for hearing this bill now, and it is a pleasure to be here.

Employment protections during state-sponsored activation is a new **key quality of life issue** for the Department of Defense State Liaison Office for 2015. Although new for us, research indicates that 12 other states do that which we are seeking here, including Idaho, your neighbor to the west. If you can indulge me, the others are AR, DE, ID, IL, LA, ME, MN, OR, TX, UT, WA, and WI. We really appreciate your consideration to joining these other states on this initiative.

So to try and explain this, the National Guard is a **hybrid state-federal entity**. While National Guard members are **subject to federal call-up** by the President of the United States, they can also be **called up for state active duty** by the Governor of Montana and other state Governors to respond to state emergencies such as fires, tornadoes and floods.

A federal law called the **Uniformed Services Employment and Reemployment Rights Act (USERRA)** protects members of the Army or Air National Guard when they are away from their civilian jobs for **federal service under title 10 or title 32** of the United States Code.

However, **USERRA does not apply** when a National Guard member must leave their job for **state active duty**. If National Guard members are to have **reemployment rights** after state active duty, it **must be by state law**.

Montana has such a law that applies to public and private employees but it is **explicitly limited to members of the Montana Army or Air National Guard**. For a Montanan who serves in the guard in another state, like Wyoming or Idaho, for example, the reemployment of a member of the National Guard of one of those states but otherwise has a civilian job in Montana is currently not protected.

Montana SB 195 will correct this current deficiency by including Montanans who are members of the National Guard of any other states.

So does this situation really happen in Montana? Yes it does! There is a Civilian Employer Information ((CEI) code used by the Employer Support for the Guard and Reserve (ESGR) program based on information self-reported by the individual Guardsman that is maintained by the Defense Manpower Data Center (DMDC).

We are able to identify that there are around 500 (of some 3,000 Montana Guardsman) who self-reported where they work. **While the majority of these are in the Montana Guard, almost 4% of those that self reported serve for various reasons for other states TAGs. These Guardsmen not only serve in the four states that border Montana, but serve in 12 states total: AR, AZ, GA, IA, ID, MN, ND, OR, SD, UT, WA, WV. For whatever reason, Utah leads with 7 Montanans in their state guard.**

SB 195 will help ensure those **who serve their nation for all 50 states when called up by the President** – regardless of where they originate - will have reemployment rights to their Montana private sector civilian job after completing the various critical duties they're known for when called by a governor for state active duty.

This bill will also provide an effective enforcement mechanism through private right of action in the event the Guard member believes their Montana employer has denied their right for reemployment after state service while assigned to the Montana TAG or another state TAG.

We thank Senator Caferro for sponsoring this measure. Thank you for taking up this issue, and for your consideration.

I stand for any questions.

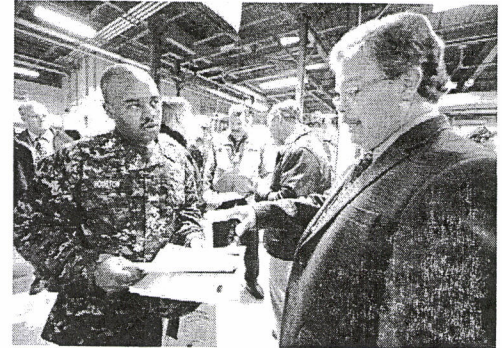
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EMPLOYMENT PROTECTIONS DURING STATE-SPONSORED ACTIVATION

Members of the National Guard who work outside of the state where they mobilize may not have employment protections during a state-sponsored activation.

KEY MESSAGE: State statutes that cover Guard members during state-sponsored mobilizations impact employers within the state. States can modify their statutes to strengthen enforcement mechanisms for members of the National Guard returning to jobs in their affiliated state and protect the employment rights of members of the National Guard who are employed outside of their affiliated state at the time of state-sponsored activations.



DISCUSSION POINTS:

- The Uniformed Services Employment and Reemployment Rights Act (USERRA)¹ does not apply when a National Guard member is called-up by their Governor to serve state active duty to respond to state emergencies such as fires, hurricanes, tornadoes, floods, etc.
- Every state has a statute that protects their civilian jobs for National Guard members on state active duty; however:
 - Several states have weak enforcement mechanisms that do not provide the member an adequate private right of action in the event the member believes the employer has denied their right for reemployment.
 - The majority of states have laws only protecting the employment of members of the National Guard assigned to that specific state.
 - Many National Guard members have civilian jobs in states other than the state of their National Guard membership.
 - Unless state law covers the person who works in that state but is assigned to another state's National Guard, they have no reemployment rights after completing state active duty.
- States can adopt legislation to strengthen their state USERRA statute by providing protections that include these substantive points:
 - The state law provides an effective enforcement mechanism through private right of action for members of the National Guard.
 - The state law provides employment protection to members of the National Guard of another state by revising wording in existing statute to recognize "*members of the National Guard of this state or any other state.*"

Many states are strengthening their statutes to protect the reemployment rights of members of their National Guard. Three-fourths of all states in their respective statute currently provide an effective enforcement mechanism. However, only a quarter of the states have a state law that includes the key seven words of "this state or of any other state" or language we believe is sufficient to provide enforceable reemployment rights. This provision will provide protection to a member of the National Guard of another state who holds a civilian job in the state with the desired provision.

¹ USERRA is a federal statute that covers the right to reemployment to a person who leaves a civilian job (federal, state, local, or private sector) for voluntary or involuntary service in the uniformed services. USERRA protects the civilian jobs of National Guard members after military training or service under Title 10 or Title 32 of the United States Code when they are called-up by the President of the United States.



EMPLOYMENT PROTECTIONS DURING STATE-SPONSORED ACTIVATION BEST PRACTICES

SUBJECT: State statutes that cover Guard members during state-sponsored mobilizations impact employers within the state. States can modify their statutes to strengthen enforcement mechanisms for members of the National Guard returning to jobs in their affiliated state and protect the employment rights of members of the National Guard who are employed outside of their affiliated state at the time of state-sponsored activations.

PRINCIPLES: States can adopt legislation to strengthen their state USERRA statute. "Best practice" protections include these substantive points:

- The state law provides an effective enforcement mechanism through *private right of action* for members of the National Guard who work within their assigned state.
- The state law also provides protection to a member of the National Guard of *another state* who holds a civilian job in the state where they do not have their National Guard membership.

BEST PRACTICES: The following state statutes apply to *public* and *private* employees, include provide protection for a member of the National Guard of *another state* who holds a civilian job in that state and provide an effective enforcement mechanism through *private right of action*.

1. Louisiana Statute Annotated Section 29:403

(11) "Service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time national guard duty, and a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty. "Service in the uniformed services" also means service in the armed forces of the United States pursuant to authorization by the United States Congress or presidential proclamation pursuant to the War Powers Resolution (50 U.S.C. 1541 et seq.). "Service in the uniformed services" also means state active duty by members of the National Guard who are activated pursuant to a call of the governor of this state or of any other state as provided for by law.

Example: If a member of the Texas National Guard has a civilian job in Louisiana and is called to state active duty by the Governor of Texas in the aftermath of a hurricane, their job in Louisiana is protected under Louisiana law, which expressly refers to members of the National Guard of "this state or of any other state." The same protection is afforded the Louisiana Guardsman who works in Texas because Texas law has a similar provision.

Louisiana Statute Annotated Section 29:422

B. The district courts of this state shall have jurisdiction over proceedings involving the Servicemembers Civil Relief Act, and the Uniformed Services Employment and Reemployment Rights Act, which shall be governed by the rules applicable to ordinary proceedings.

C. The district and appellate courts shall give preference in scheduling such proceedings, upon the motion of any person in the uniformed services, or the person's attorney, who presents certification that the person has performed service in the uniformed services or is in service in

the uniformed services.

D. Suits to enforce the provisions of this Part may be instituted in any court of competent jurisdiction and appropriate venue by the attorney general of Louisiana.

2. Idaho Code Annotated Section 46-407

(a) Any member of the Idaho national guard who is ordered to duty by the governor, or any Idaho employee who is a member of the national guard of another state and who is called into active service by the governor of that state, and who at the time of such order to duty is employed by any employer other than the United States government, shall be entitled to reemployment as set forth in section 46-409, Idaho Code.

Example: If a member of the Montana National Guard has a civilian job in Idaho and is called to state active duty by the Governor of Montana to fight a forest fire, their job in Idaho is protected because Idaho law protects the member of the national guard of another state who is called into active service by the governor of that state. However, the converse is not true for a member of the Idaho National Guard who works in Montana because Montana law only applies to members of the Montana National Guard on state active duty.

(d) If any employer fails or refuses to comply with this section, the district court in the county in which the member was employed shall have the power, upon petition by the member, to compel the employer to comply with this section and to compensate the member for lost wages and benefits, for costs of the action, and for reasonable attorney's fees. The court shall order a speedy hearing in any such case and advance it on the calendar.